No. 88-916

Supreme Court, U.S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

WINSTON A. MITCHELL, M.D.;
WINSTON A. MITCHELL, M.D., INC.,
Petitioners,

VS.

FRANK R. HOWARD MEMORIAL HOSPITAL;
ROBERT HARRAH;
STEVEN WENTWORTH, M.D.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a hospital which (i) receives a substantial portion of its $5,000,000 annual revenue from out-of-state public and private insurance programs (including federally subsidized programs); (ii) purchases an unknown amount of medical supplies and equipment from out-of-state sources; and (iii) has an unknown number of out-of-state patients, sufficiently affect interstate commerce to permit a federal court to assume jurisdiction under the Sherman Act?

2. Can it be said, *as a matter of law*, that a hospital which receives a substantial portion of its $5,000,000 annual revenue from out-of-state public and private insurance programs (including federally subsidized programs) does not affect interstate commerce so that a summary judgment can be entered dismissing a Sherman Act claim *before* discovery is permitted to determine (i) the amount of medical supplies and equipment purchased from out-of-state sources, and (ii) the number and dollar volume of patients from out-of-state?

3. Assuming, *arguendo*, a small, rural hospital which receives a substantial portion of its $5,000,000 annual revenues from out-of-state sources, treats no out-of-state patients and purchases a minimal amount of supplies from out-of-state; do these facts, as a matter of law, divest the federal courts of jurisdiction under the Sherman Act?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were petitioner Winston A. Mitchell, M.D., Winston A. Mitchell, M.D., Inc. and respondents Frank R. Howard Memorial Hospital, Robert Harrah and Steven Wentworth, M.D. Petitioner Winston A. Mitchell, M.D., Inc. is a professional corporation and has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Winston A. Mitchell, M.D. and Winston A. Mitchell, M.D., Inc. respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on August 9, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 853 F.2d 762 and is reprinted in the appendix hereto as Appendix A.

The memorandum decision of the United States District Court for the Northern District of California

(Vukasin, D.J.) has not been reported. It is reprinted in the appendix hereto as Appendix B.

JURISDICTION

Invoking federal jurisdiction under 15 U.S.C. Section 15 and Section 26 and 42 U.S.C. Section 2000e-5(f)(3) and 28 U.S.C. Section 1331, the petitioners brought this suit in the Northern District of California. On April 21, 1987, the Northern District granted respondents' motions for summary judgment upon the Sherman Act and Title VII claims.

On petitioners' appeal, the Ninth Circuit on August 9, 1988, entered a judgment and an opinion affirming the Northern District's order of summary judgment with respect to the Sherman Act claims and reversed the Northern District's order respecting the Title VII claim. It is the grant of summary judgment against petitioner as to the Sherman Act claims which forms the basis of this petition. No petition for rehearing was sought.

On October 28, 1988, Justice O'Connor ordered that the time for filing this petition for Writ of Certiorari be extended to and including November 28, 1988.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This Petition involves the Sherman Act; 15 U.S.C. Sections 15 and 26.

STATEMENT OF THE CASE

Petitioner is a highly competent radiologist and nationally recognized authority in cardiovascular radiology.

From 1971 to 1980, he was a member of the medical staff of Loma Linda University. In April, 1980, respondents Howard Hospital and Robert Harrah induced petitioner to leave Loma Linda University and relocate his practice and family in Willits, California, a small rural community located north of San Francisco. Respondent hospital is the only hospital in Willits, California but has had annual revenues in excess of $5,000,000 per year since 1980. Over 40% of these funds come from the Medicare program and approximately 11% from the Medi-Cal program, funded in part by Medicaid, a federal subsidy program. A significant, but as yet unquantified, portion of the balance of the hospital's revenues come from insurance companies, many of which are located outside of the State of California. The radiology department itself has generated revenues in excess of $600,000 per year with the sources of revenues being similar to that of the hospital. On a yearly basis the hospital has purchased approximately $600,000 in supplies and equipment. It has not yet been determined what portion of those supplies or that equipment originates from outside the State of California. It is undisputed that the hospital treats few patients from outside the State of California, but the exact number of them and the dollar value generated thereby is in dispute. The Hospital contends that it is "zero percent", *i.e.* less than one percent, which could reflect up to $50,000 per year in out of state revenue. Petitioner sought discovery to determine the exact number, but such discovery was denied.

In 1985, petitioner was ousted from the medical staff of the hospital which, being the only one in the area, has prohibited petitioner from practicing his profession and forced he and his family to move from the area. This ouster is alleged to have occurred because petitioner refused to enter into a contract with the hospital which

would have been illegal because it would have resulted in an improper split of professional fees between petitioner and the hospital and it would have given the hospital unlawful control over the petitioner's medical judgment in his treatment of patients. It is also alleged that respondents decided to terminate petitioner's relationship with the hospital because they disapproved of his Mormon religious practices.

The original complaint in this action was filed in October of 1986 setting forth only the antitrust and pendent state claims. The religious discrimination claim was not included at that time because plaintiffs had not exhausted their administrative remedies. In November, 1986, prior to the filing of responsive pleadings, petitioner filed a First Amended Complaint setting forth the religious discrimination claim.

In January, 1987 respondents filed motions to dismiss and for summary adjudication and on February 19, 1987 the District Court granted the motion for summary judgment on the antitrust claims at oral argument and took the motion to dismiss the religious discrimination and pendent state claims under submission until March 4, 1987 at which time it entered an order granting the motion for summary judgment on antitrust claims, dismissing the religious discrimination claims and dismissing all pendent claims. A timely motion for reconsideration was brought and granted. Without the ability to conduct additional discovery, additional evidence was submitted by both parties, considered by the Court and on April 21, 1987, the motion for summary judgment was once again granted.

A timely appeal was taken before the Ninth Circuit which ultimately affirmed the grant of summary judgment as to the antitrust issues and reversed summary judg-

ment on the religious discrimination issue. It is from the final determination on the antitrust issues that petitioner requests certiorari.

The Ninth Circuit acknowledged that a substantial portion of the hospital's annual revenues came from out of state public and private insurance programs including federally subsidized programs and that petitioner's department itself generated in excess of $600,000 a year in revenue. The Ninth Circuit also noted that an unknown amount of medical supplies and equipment originates from out of state sources. However, the Ninth Circuit was incorrect when it concluded that it was undisputed that the hospital treated no out of state patients.

Both the District Court and the Ninth Circuit rejected the petitioner's argument that substantial, *i.e.* perhaps as much as $5,000,000.00 per year, activity in *one line* of commerce (interstate flow of payment funds) is enough to establish Sherman Act jurisdiction. Instead, as demonstrated by the key language from the Ninth Circuit's opinion, both the lower courts erroneously concluded that because the business involved in this case was a hospital, multiple lines of interstate commerce must be established:

> "[A]s the district court observed, 'determinations of [Sherman Act] jurisdiction [in hospital cases] are based not merely upon revenue figures, but on a broad aggregate of factors including proximity of the facility to regional centers of commerce or to other states, treatment of significant numbers of out of state patients, purchase of equipment and supplies from interstate sources and interstate transfer of payment for patient care.' (Citation omitted)
>
> We agree with the District Court that these factors weigh against finding Sherman Act jurisdiction here.

> The small defendant hospital is located in a remote area of northern California over 150 miles from either the Oregon or Nevada borders and over 100 miles from the nearest significant urban center, San Francisco. According to the uncontroverted evidence in the record, the Hospital has not provided medical services for even one out of state patient at least since 1983. (Footnote omitted) The mere fact that this small hospital receives some out of state insurance payments and may have purchased some supplies from out of state sources does not amount to a showing that as a matter of practical economics the hospital's activities have a not insubstantial effect on any interstate commerce. (Footnote omitted)"[1]

The Ninth Circuit, after noting the existence of disputes amongst District and Circuit Courts of Appeal as to

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[1]In a footnote to this reasoning, the Ninth Circuit notes, but rejects petitioners' allegation that the hospital purchases an unknown quantity of supplies out of state, as well as petitioners' explanation that without further discovery he cannot ascertain the precise amount.

> "We do not feel that further discovery on this point could produce evidence that would change our conclusion that this rural California hospital's activities do not affect any aspect of interstate commerce sufficient to trigger Sherman Act jurisdiction."

Additionally, petitioners take exception to the Ninth Circuit's characterization of the affidavit of the hospital's administrator upon which the courts below based their conclusion that there were no out of state patients. The affidavit contained no information for the years 1984 and 1985 and merely stated that "zero percent" of the revenue for 1986 came from out of state patients. The term "zero percent" may not mean no revenue, but less than 1% ($50,000). It is on this issue, as well as that of quantifying the out of state supplies and equipment purchases that petitioners had asked for the ability to conduct discovery prior to the entry of an order granting summary judgment.

the determination of hospital impact on interstate commerce stated in a conclusionary manner "our canvasing of the hospital cases supports our judgment that Dr. Mitchell has failed to make a showing sufficient to establish Sherman Act jurisdiction. The cases in which the Courts have found Sherman Act jurisdiction involve hospitals whose activities appear to have had a much greater effect on interstate commerce than the activities of the hospital in this case."

Petitioners seek this Court's review of the District Court and Ninth Circuit's apparent determination that a *rural* hospital, without a significant number of out of state patients, (irrespective of (i) the volume of out of state funds used to pay for patient costs; and (ii) what facts might be developed to show the out of state purchase of supplies and equipment) cannot, as an apparent matter of law, invoke federal jurisdiction under the Sherman Act.

REASONS FOR GRANTING THE WRIT

I.

The Ninth Circuit's Decision That A Rural Hospital Cannot Invoke Sherman Act Jurisdiction Because It Does Not Treat Out Of State Patients, Irrespective Of The Amount Of Interstate Funding Of Local Patient Care And Interstate Purchase Of Supplies And Equipment, Furthers The Already Rampant Uncertainty Among District And Circuit Courts As To The Threshold Necessary In Hospital Antitrust Cases To Invoke Sherman Act Jurisdiction

In prosecuting this case and similar cases, petitioners' counsel has been repeatedly struck with the inability of counsel, District Courts and Circuit Courts to determine the factors, and level of involvement for each of those

factors, necessary to invoke Sherman Act jurisdiction with regard to interstate commerce.

As the Ninth Circuit points out in its opinion below, the presence of interstate funds to pay for local patient care, the purchase of medical supplies from out of state, the treatment of some number of out of state patients, the recruiting of faculty from other states and similar factors have resulted in a split amongst the circuits as to whether and to what extent jurisdiction under Sherman Act can be invoked. *Compare e.g. Mishler v. St. Anthony's Hospital Systems,* 694 F.2d 1225 (10th Cir. 1981), *Tarleton v. Meharry Medical College,* 717 F.2d 1523 (6th Cir. 1983), *Crane v. Intermountain Health Care, Inc.,* 637 F.2d 715 (10th Cir. 1980) (enbanc) with *Doe v. St. Joseph Hospital,* 788 F.2d 411 (7th Cir. 1986), *Hayden v. Bracy,* 744 F.2d 1338, 1342-43 (8th Cir. 1984), all cited by the Ninth Circuit in its decision in this case. The only distinguishing feature between these five cases is the several Courts' seemingly subjective determination as to whether otherwise similar facts have met the courts' apparent "gut reaction" as to whether sufficient interstate activity has occurred to warrant federal jurisdiction.

Indeed, the briefs of the parties to this action contain citations to no less than 40 federal court decisions, nearly evenly split, involving similar facts with varying levels of financial involvement, without providing a reasonable road map to litigants, their counsel or the courts as to the manner of weighing each factor to determine whether jurisdiction is appropriate.

Some of the cases cited involve dollar values significantly less than present in this case (see, e.g. *Katzenbach v. McClung,* 390 U.S. 194 (1964), a non-hospital case involving the purchase of approximately $70,000 of supplies from out of state sources; *Feminist Women's Health*

Center v. Mohammad, 586 F.2d 530, 539-41 (5th Cir. 1978), *cert. den.* 444 U.S. 924, $4,000 worth of out of state supplies and $10,000 worth of yearly revenue from out of state patients and *Doctors' Inc. v. Blue Cross of Greater Philadelphia*, 490 F.2d 48 (3rd Cir. 1973), jurisdiction found on the basis of a single line of commerce, the purchase of $200,000 per year of interstate supplies.

Additionally, the Ninth Circuit's opinion appears to stand for the proposition that a rural hospital, simply because it is rural and not located near a state border cannot, as a matter of law, meet the interstate commerce jurisdictional requirement of the Sherman Act despite its level of receipt of interstate funds from commercial insurers or the federal/medical reimbursement programs, its dollar volume of purchase of out of state equipment and supplies (although unknown in this case) or treatment of out of state patients, albeit constituting less than 1% of its gross revenues.

Petitioners have contended below that a single line of commerce, here the flow of interstate funds for reimbursement of patient care, is sufficient to invoke federal jurisdiction. Petitioners respectfully suggest that if the industry involved in this matter was other than health care, the receipt of funds from interstate sources for payment for goods and services by a business catering otherwise to individuals residing predominantly within a single state would nevertheless be thought sufficient to invoke federal jurisdiction.

Indeed, in reaching its decision in this case, the Ninth Circuit had to ignore and/or distinguish a long line of cases, in its own Circuit as well as others, where jurisdiction was founded on *one line* of commerce and/or dollar amounts in a few lines far smaller than Howard Hospital's $5,000,000.00 in out of state revenues.

The Ninth Circuit's opinion did attempt to distinguish its earlier opinion in *Palmer v. Roosevelt Lake Log Owners Assn., Inc.* 651 F.2d 1289 (9th Cir. 1981) ($35,000 per year in the log salvaging business). But the opinion ignored many other cases which found jurisdiction based upon a not insubstantial effect on one line of commerce. For example, in *Western Waste Service Systems v. Universal Waste Control*, 616 F.2d 1094 (9th Cir.) *cert. den.*, 449 U.S. 869 (1980), the defendants engaged in the garbage collection industry and had total interstate business of approximately $200,000.00 a year, while the plaintiff spent only about $100,000.00 per year for out of state equipment. In *J.P. Mascaro & Sons, Inc. v. William J. O'Hara, Inc.*, 565 F.2d 264 (3rd Cir. 1977), jurisdiction was based upon $62,000.00 a year of out of state equipment and supply purchases; $11,000.00 per year of out of state insurance premiums; $50,000.00 per year of payments on out of state loans; and $22,000.00 a year of payments from out of state customers. *See also, Tarleton v. Meharry Medical College, supra*, 717 F.2d 1523 at 1528 (jurisdiction with less than 5% out of state patients and $1,000,000.00 in total fees in the allegedly illegal medical practice plan fund). In *Englert v. City of McKeesport*, 736 F.2d 96 (3rd Cir. 1984), federal jurisdiction was upheld based upon an allegedly illegal exclusive contract for inspection of electrical work in buildings in the small city of McKeesport, Pennsylvania. Although no specific numbers are discussed in the case, it is highly doubtful that electrical work in new construction in such a small city could have been anywhere near the $5,000,000.00 in gross revenues of Howard Hospital.

See also, Perrytown Wholesale, Inc. v. Pioneer Distributing Company, 353 F.2d 618 (10th Cir. 1965):

> "Perrytown urges that the impact on interstate commerce is not substantial enough to invoke the application of the federal antitrust laws. The court found a total loss of profits because of the conspiracy in the amount of $13,140.96, of which $1,938.31 arose from Colorado operations. Damages because of loss of fixtures and merchandise was fixed at $4,146.21, of which $652 occurred in Colorado. Pioneer was a Kansas based firm distributing out of a Wichita warehouse in which the goods came to rest. The argument is that the only effect on interstate commerce is that reflected by the business done in Colorado.
>
> In *United States v. Yellow Cab Co.*, 332 U.S. 218, 225, and in *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 485, the Supreme Court said a Section 1 Sherman Act violation is determined by the nature of the restraint and not by the amount of commerce affected. In *Union Carbide and Carbon Corporation v. Nisley*, 10 Cir. 300 F.2d 561, 585, certiorari dismissed sub nom. 371 U.S. 801, we said that Section 1 condemns unreasonable restraint 'irrespective of the amount of trade or commerce involved.' As we have shown the restraint is unreasonable. That vice is not removed by the low dollar amount of the damages resulting from loss of interstate trade."

See also, Ringtown Wilbert Vault Works v. Schuylkill Memorial Park, CCH 1987-1 Trade Cases, Para 67,454 (E.D.Penn. 1986) ($6,000 per year of materials from interstate commerce aggregating to $100,000 over the length of the illegal activity):

> "There is no simple benchmark by which I may determine whether this is a not insubstantial effect on interstate commerce. It is appropriate to consider the aggregate effect over the duration of the violation. The effect of a one shot transaction is quite different from that of an ongoing practice. However, the figure is meaningless unless it is viewed in the context of a time frame. Thus, the cases the court has reviewed have consistently stated the aggregate amount in that context. None of those cases has held an annual dollar amount of $6,000 to be 'substantial.' On the other hand, none of them has considered a tying arrangement which has continued for so long a period. *See Bell v. Cherokee Aviation Corp.* [1981-2 TRADE CASES Para. 64,318], 600 F.2d 1123, 1130 (6th Cir. 1981) ($140,000 over three years not insubstantial); *Microbyte Corp. v. New Jersey State Golf Ass'n.* [1986-2 TRADE CASES Para. 67,228], 55 U.S.L.W. 2078 (D.N.J. June 26, 1986) ($27,264 in one year is not *de minimis*); *AAMCO Automatic Transmissions, Inc. v. Taylor* [1975-2 TRADE CASES Para. 60,666], 407 F.Supp. 430, 436 (E.D.Pa. 1976) ($50,000 over four years is not insignificant). Considering the aggregate volume of interstate commerce affected in this case, I find it is not insubstantial."

(Footnotes omitted.)

It is not possible to reconcile the foregoing cases with the Ninth Circuit's conclusion that more than one line of

commerce is necessary to establish jurisdiction in hospital cases. Unfortunately, The Ninth Circuit's decision in the case below is typical of the difficulty the federal courts in this country have had in addressing the issue of Sherman Act jurisdiction for hospitals since this Court ruled in the landmark case of *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982), that hospitals and doctors are subject to the antitrust laws. It is respectfully submitted that it is high time for this Court to address definitively the issue of when a hospital's activity affects interstate commerce so that this highly unreliable series of doctor versus hospital cases, contradictory often within a single circuit and frequently contradictory circuit to circuit, can, once and for all, be reconciled.

II.

The District Court's Refusal To Permit Discovery As To The Level Of Out Of State Purchases Of Supplies And Equipment And Its Refusal To Permit Discovery As To The Actual Volume Of Out Of State Patients Resulted In An Improper Grant Of Summary Judgment. The Ninth Circuit's Decision To Affirm The District Court's Action Is An Error Of Law, And In Conflict With The Decisions Of This Court And Other Circuits

The facts in this case are significantly in dispute. Particularly in dispute is the level of out of state purchase of supplies and equipment and the level of treatment of out of state patients.

Respondents introduced declarations in support of their motion for summary judgment below stating that equipment and supplies are purchased predominately within the State of California. However, petitioners believe that the test for determining whether the goods or

funds enter into interstate commerce is not where the retailer or even the distributor is located, but rather where the manufacturer or supplier is located. *See Mascaro v. O'Hara*, 565 F.2d 264 (3rd Cir. 1977) ("The defendants' contention that local purchases do not affect the jurisdictional question is based on the 'coming to rest' doctrine — that goods which have come into possession of a local retailer for resale have left the stream of interstate commerce. The theory may have validity in determining whether the commerce clause precludes state taxation or regulation of interstate commerce (citation omitted) but it has no force in determining whether the Sherman Act's commerce requirement is satisfied") *See* also *Katzenbach v. McClung*, 379 U.S. 294, 302 (1964). Similarly, respondents provided an affidavit regarding out of state patients that contained no information for 1984 or 1985 and the clever statement that revenue for out of state patients equaled "zero percent" for 1986. Of course, with the use of "zero percent" respondents can avoid disclosing the presence of out of state patients to the extent of $25,000-50,000 in revenue per year before reaching a 1% level. Notwithstanding the absence of reliable evidence, the Ninth Circuit determined that there were "no patients" from out of state and further stated that it did not care whether there were out of state supplies purchased or even out of state patients if the number were small.

Apparently feeling that a rural hospital has no business invoking the jurisdiction of the Sherman Act, however many millions of dollars of interstate funds it receives, the Ninth Circuit upheld the District Court's granting of summary judgment despite the fact that further discovery was necessary in order to determine the actual nature and scope of the interstate commerce impact this hospital actually has. Although summary judgment may be "possible" under such circumstances (*See The Loan Store, Inc. v.*

Independent Food Stamps Associates, 671 F.Supp. 844 (D. C. Mass. 1987)), "where 'the proof is largely in the hands of the alleged conspirators,' dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *See Hospital Building Co. v. Rex Hospital Trustees* 425 U.S. 738, 746 (1976). As this Court has further stated, "this rule applies with no less force to a Sherman Act claim, where one of the requisites of a cause of action is the existence of a demonstrable nexus between the defendants' activity and interstate commerce." *See McLain v. Real Estate Board of New Orleans,* 444 U.S. 232, 246 (1980).[2]

It appears that the courts below have exercised their discretion to grant summary judgment in this case, notwithstanding the fact that the hospital, in one line of commerce (its receipt of revenues from out of state sources) has far exceeded other cases in which jurisdiction has been found to be appropriate, simply because the respondent here is a rural hospital. No clearer example of that can be found than in the Ninth Circuit's opinion at footnote 4 in which that Court, noting the absence of discovery to sustain the precise amount of hospital purchases from out of state, stated, "we do not feel that further discovery on this point *could produce evidence that would change our conclusion* that this rural California hospital's activities do not affect any aspect of interstate commerce sufficient to trigger Sherman Act jurisdiction." (Emphasis supplied)

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[2]In general, subject matter jurisdiction, particularly in antitrust cases, has not been found normally susceptible to resolution by way of a motion for summary judgment. See *Fortner Enterprises, Inc. v. U.S. Steel Corp.,* 394 U.S. 495 (1969); *Capitol Industries EMI, Inc. v. Bennett,* 681 F.2d 1107 (9th Cir.) *cert den.,* 103 S.Ct. 570 (1982).

Petitioners' counsel has not found case law to support the Ninth Circuit's apparent statement of law that courts may ignore possible elements of interstate commerce simply because they find that a business is rural and not located near state borders of a major metropolitan area. Additionally, notwithstanding Congress' recognition of the nationwide impact of local hospital activities in enacting the "Health Care Quality of Improvement Act of 1986 (P.L. 99-660, 42 U.S.C. Sections 12001-12032) and the Third Circuit's decision in *Doctors' Inc. v. Blue Cross of Greater Philadelphia,* 490 F.2d 48 (3rd Cir. 1973) that $200,000 per year of interstate supplies in *one* line of commerce is sufficient for Sherman Act jurisdiction, the Ninth Circuit has enacted its apparent rule that otherwise apparently sufficient volume of interstate commerce found in only a single line is not sufficient to confer jurisdiction of courts in that circuit.

The enactment of this apparent rule by the Ninth Circuit is in conflict with decisions of this Court, together with decisions of other circuits. In addition, the decision of the District Court and the Ninth Circuit to grant summary judgment which in effect dismisses a Sherman Act claim without permitting the petitioner to conduct the discovery necessary to demonstrate impact on interstate commerce in other lines of commerce (out of state supplies and out of state patients) raises an issue of nationwide importance as to the availabiltiy of jurisdiction of the federal courts to physicians who practice at hospitals other than those near state lines or located in a major urban area.

Therefore this petitioner presents this Court with a novel question of whether the rural nature of a hospital can, as it seems to have in this case, *standing alone*,

disqualify it from being subject to federal Sherman Act jurisdiction.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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D.C. No. CV-86-5790-JPV

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WINSTON A. MITCHELL, M.D.;
WINSTON A. MITCHELL, M.D., INC.,
Plaintiffs-Appellants,
v.
FRANK R. HOWARD MEMORIAL HOSPITAL;
ROBERT HARRAH; STEVEN WENTWORTH, M.D.,
Defendants-Appellees.

OPINION

Appeal from the United States District Court
for the Northern District of California
John P. Vukasin, Jr., District Judge, Presiding

Argued and Submitted
June 15, 1988 — San Francisco, California

Filed August 9, 1988

Before: Alfred T. Goodwin, Chief Judge,
Herbert Y. C. Choy, and William A. Norris,
Circuit Judges.

Opinion by Judge Norris

SUMMARY

Antitrust/Courts and Procedure

Appeal from district court grant of summary judgment for defendant. The court held that the plaintiff failed to

show that the hospital's activities had a substantial effect on interstate commerce.

Frank R. Howard Memorial Hospital terminated Dr. Winston Mitchell's oral contract to provide radiology services and hired another radiologist under an exclusive contract. Dr. Mitchell brought suit, alleging violation of the Sherman Act and Title VII because he is a Mormon. The district court entered summary judgment for the hospital on all counts.

[1] Affirming this part of the lower court ruling, the court concluded that the facts do not amount to a showing that as a matter of practical economics, the hospital's activities have a substantial effect on any interstate commerce. [2] The court held that as a matter of practical economics, Dr. Mitchell failed to make a sufficient showing of effect on interstate commerce to establish Sherman Act jurisdiction. [3] However, the district court erred in rejecting as legally insufficient Dr. Mitchell's allegations that he was an employee of hospital for the purposes of Title VII. [4] The court inferred from the facts alleged that the hospital controlled the "means and manner" of Dr. Mitchell's performance. Because this was not a situation in which it appeared beyond doubt that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief, the court reversed the dismissal of his Title VII claim.

COUNSEL

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Robert L. Rusky, Hanson, Bridgett, Marcus, Vlahos & Rudy, San Francisco, California; Theodore A. Kolb, Sulli-

van, Roche & Johnson, San Francisco, California, for the defendants-appellees.

OPINION

NORRIS, Circuit Judge:

From July 1980 until August 31, 1985, appellant Winston A. Mitchell served under oral contract as the radiologist for appellee Howard Memorial Hospital ("the Hospital"), a 38-bed facility that is the only hospital in the rural town of Willits, Mendocino County, California (pop. 4200). After the Hospital terminated its agreement with Dr. Mitchell and entered into an exclusive contract for hospital-based radiology services with Dr. Steven Wentworth, Dr. Mitchell sued in federal district court claiming that the exclusive arrangement between Howard Memorial Hospital and Dr. Wentworth violated the Sherman Act. He also claims that the Hospital violated Title VII by discriminating against him because he is Mormon. Dr. Mitchell also pleaded a number of pendent state claims. The district court entered summary judgment for the Hospital on the antitrust claims on the ground that its activities did not, as a matter of law, have sufficient impact on interstate commerce to create jurisdiction under the Sherman Act. The district court also granted defendants' motion to dismiss the Title VII counts on the ground that Dr. Mitchell was not engaged in any employment relationships which are protected by Title VII. Finally, the court dismissed the pendent claims and entered judgment for the defendants. Our jurisdiction rests on 28 U.S.C. § 1291.

I

Dr. Mitchell argues that because the Hospital receives a substantial portion of its $5,000,000 annual revenues from out-of-state public and private insurance programs, because the Hospital purchases an unknown amount of medical supplies from out-of-state sources, and because the radiology department alone generates over $600,000 a year in revenue, the Hospital's activities, although local in nature, substantially affect interstate commerce. We review a summary judgment de novo. *Hall v. State of Hawaii,* 791 F.2d 759, 761 (9th Cir. 1986).

In *McLain v. Real Estate Bd.,* 444 U.S. 232 (1980), the Supreme Court held that to establish jurisdiction under the Sherman Act a plaintiff must show either "that the defendants' activity is itself in interstate commerce or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce." *Id.,* 444 U.S. at 242. As the Ninth Circuit has interpreted *McLain,* to establish jurisdiction under the Sherman Act, Dr. Mitchell is required to identify a relevant aspect of interstate commerce and then show "as a matter of practical economics" that the Hospital's activities have a "not insubstantial effect on the interstate commerce involved." *Palmer v. Roosevelt Lake Log Owners Ass'n, Inc.,* 651 F.2d 1289, 1291 (9th Cir. 1981).[1]

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[1]Appellees argue that *McLain* requires that only the Hospital's 'infected' activities, i.e., those of the radiology department, be considered for the purposes of Sherman Act jurisdiction. Dr. Mitchell, on the other hand, pointing to *Western Waste Serv. Systems v. Universal Waste Control,* 616 F.2d 1094, 1097 (9th Cir.), *cert. denied,* 449 U.S. 869 (1980), argues that the Ninth Circuit has adopted a "general business" activities test which requires examination of all of the Hospital's business activities. We assume, without deciding, that all "general business" activities of the Hospital are relevant to our

We agree with the district court that Dr. Mitchell has failed to show a not insubstantial effect on any appreciable activity in interstate commerce.[2] Although the Supreme Court has recognized that the receipt of insurance payments and the purchase of hospital supplies from out-of-state sources are relevant to the determination of whether a hospital's activities substantially affect interstate commerce, *see Hospital Building Co. v. Rex Hosp. Trustees,* 425 U.S. 738, 744 (1976), as the district court observed, "determinations of [Sherman Act] jurisdiction [in hospital cases] are based not merely upon revenue figures, but on a broad aggregate of factors including proximity of the facility to regional centers of commerce or to other states, treatment of significant numbers of out-of-state patients, purchase of equipment and supplies from interstate sources and interstate transfer of payment for patient care." Order Granting Plaintiff's Motion for Reconsideration and Granting Defendants' Motion for Summary Judgment. [Excerpt of Record, Tab No. 43, at 3.]

[1] We agree with the district court that these factors weigh against finding Sherman Act jurisdiction here. The small defendant hospital is located in a remote area of northern California over 150 miles from either the Oregon or Nevada borders and over 100 miles from the nearest significant urban center, San Francisco. According to

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inquiry, including those outside the radiology department. Because we believe the district court's summary judgment was proper under either theory, we express no view at this time as to the state of Ninth Circuit law on this point.

[2]The two relevant aspects of interstate commerce that Dr. Mitchell has identified are the fields of health insurance and medical supplies. For the reasons discussed below, we do not believe that either of these areas is significantly enough affected by the Hospital's activities to support Sherman Act jurisdiction.

the uncontroverted evidence in the record, the Hospital has not provided medical services for even one out-of-state patient at least since 1983.[3] The mere fact that this small hospital receives some out-of-state insurance payments and may have purchased some supplies from out-of-state sources does not amount to a showing that as a matter of practical economics the hospital's activities have a not insubstantial effect on any interstate commerce.[4]

As the decisions of other courts make clear, whether a hospital's activities sufficiently affect interstate commerce to create Sherman Act jurisdiction is a highly fact- based question calling for common sense judgment. Dr. Mitchell cites several hospital cases in which courts have found a sufficient impact on interstate commerce to support Sherman Act jurisdiction. In *Mishler v. St. Anthony's Hosp. Systems,* 694 F.2d 1225 (10th Cir. 1981), for example, the Tenth Circuit reversed the district court's dismissal of the complaint because the plaintiff doctor alleged that the hospital received substantial revenues from out- of-state insurance, that the hospital received medical supplies from out-of-state, and that the hospital provided services to out-of-state patients. *Id.* at 1227. Similarly, in *Tarleton*

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[3]According to the uncontroverted affidavit of the Hospital's administrator, Howard Memorial has serviced no out-of-state patients since 1983 and its radiology department, the focal point of Dr. Mitchell's claim, has purchased no equipment or supplies from out-of-state sources. Excerpt of Record at Tab. No. 17.

[4]Dr. Mitchell alleges that the hospital purchases an unknown quantity of supplies out of state, but argues that without further discovery he cannot ascertain the precise amount. We do not feel that further discovery on this point could produce evidence that would change our conclusion that this rural California hospital's activities do not affect any aspect of interstate commerce sufficient to trigger Sherman Act jurisdiction.

v. Meharry Medical College, 717 F.2d 1523 (6th Cir. 1983), the Sixth Circuit found jurisdiction where the defendant medical college provided services for a substantial number of out-of-state patients, actively recruited its students and faculty from other states, obtained significant amounts of medical supplies from out-of-state, and received both private and public funding from out-of-state. *See also Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715 (10th Cir. 1980) (en banc) (same facts as *Mishler*).[5]

Other courts, however, have held that Sherman Act jurisdiction does not extend to claims against hospital defendants in somewhat similar circumstances. In *Doe v. St. Joseph's Hosp.*, 788 F.2d 411 (7th Cir. 1986), for example, the Seventh Circuit held that allegations that the defendant hospital had purchased medical supplies out of state, received reimbursement from out-of-state insurance programs, treated out-of-state patients, and shared medical information and training across state lines were legally insufficient to establish Sherman Act jurisdiction. *ID*, at 417. And in a case relatively close to the one at hand, the Eighth Circuit upheld the dismissal of a Sherman Act claim in which the plaintiff doctor alleged that the defendant hospital purchased supplies from out-of-state sources and that 88% of the defendant hospital's bills were paid by third-party payors, 33% of

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[5]Although not relied on by Dr. Mitchell, in *Hospital Building Co. v. Rex Hospital Trustees*, 425 U.S. 738 (1976), the Supreme Court reversed the dismissal of a Sherman Act claim against a hospital which allegedly purchased 80% of its supplies out of state, serviced out-of-state patients, received insurance payments from out-of-state companies, and was involved in a multi-million dollar expansion financed in large part by loans from out-of-state sources.

which were Medicare payments. *Hayden v. Bracy*, 744 F.2d 1338, 1342-43 (8th Cir. 1984).

[2] Our canvassing of the hospital cases supports our judgment that Dr. Mitchell has failed to make a showing sufficient to establish Sherman Act jurisdiction.[6] The cases in which courts have found Sherman Act jurisdiction involve hospitals whose activities appear to have had a much greater effect on interstate commerce than the activities of the hospital in this case. In sum, we hold that "as a matter of practical economics" Dr. Mitchell has failed to make a sufficient showing of effect on interstate commerce to establish Sherman Act jurisdiction.

II

Dr. Mitchell also appeals the district court's dismissal of his Title VII counts for failure to state a claim. The district court dismissed the Title VII counts with prejudice on the ground that Dr. Mitchell, as an independent contractor with the Hospital, did not have an employment relationship with either the Hospital or with his patients which is protected by Title VII. We review de novo dismissals under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. *Guillory v. County of Orange*, 731 F.2d 1379, 1381 (9th Cir. 1984).

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[6]Dr. Mitchell's reliance on *Palmer v. Roosevelt Log Owners Ass'n*, 651 F.2d 1289 (9th Cir. 1981), a non-hospital case, is also misplaced. In *Palmer*, plaintiff alleged that the defendants had conspired to monopolize trade in the retrieval and sale of abandoned logs on Roosevelt Lake. This court found jurisdiction, despite the relatively small dollar amounts involved, because the alleged restraint would "unreasonably burden [ ] the free and uninterrupted flow" of Washington lumber products out-of-state. *Id.* at 1292.

A

Dr. Mitchell argues first that the district court erred in rejecting his factual allegations that for some purposes he was an employee of the Hospital, not an independent contractor.[7] He contends that the facts alleged in his Title VII counts are sufficient to withstand a motion to dismiss for failure to state a claim. We agree.

[3] It is axiomatic that in considering a motion to dismiss under Rule 12(b)(6) the district court must accept as true all facts as alleged by the plaintiff. *Hospital Building Co.*, 425 U.S. at 740. Moreover, a plaintiff's claims should not be dismissed on the pleadings "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). We feel that Dr. Mitchell's complaint satisfies this standard and that the district court erred in rejecting as legally insufficient Dr. Mitchell's allegations that, for the purposes of Title VII, he was an employee of defendant Hospital.

As we noted in *Lutcher v. Musicians Union Local 47*, 633 F.2d 880 (9th Cir. 1980), determining whether a relation-

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[7]The district court, apparently relying on Dr. Mitchell's own use of the term "independent contractor" to describe his relationship with the hospital, First Amended Complaint at ¶ 61, "reject[ed] plaintiff's assertions that he was, for some purposes, an employee of the hospital. . . ." Order Granting Defendants' Motion for Summary Judgment on Counts 1 and 2 and Motion to Dismiss Counts 3-15, at 3. Dr. Mitchell points out, however, that his self-characterization as an independent contractor does not appear in the portion of his complaint which alleges Title VII violations. Clearly, such an inconsistency does not render the pleadings inadequate. Fed.R.Civ.P. 8(e)(2). *See also* C. Wright and A. Miller, Federal Practice and Procedure: Civ. ¶ 1283 (1969).

ship is one of employment, in which case Title VII protections apply, or rather one of independent contractual affiliation, in which case they do not, requires a fact-specific inquiry which "depends upon the economic realities of the situation." *Id.* at 883. This is not to say that there are no guidelines to aid courts in this inquiry. In *Lutcher* itself we identified a number of factors that should be considered when determining whether an employment relationship existed, the primary one being the extent to which the "employer" has a right to control the means and manner of the worker's performance. *Id.* Other factors include: whether the "employer" or the individual in question furnishes the equipment used and the place of work; the length of time during which the individual has worked; the method of payment; and whether the work is an integral part of the business of the "employer." *Id.* at n.5.

[4] When these factors are examined in light of Dr. Mitchell's factual allegations, it becomes clear that the pleadings are not insufficient on their face. Dr. Mitchell alleges that all radiology services were provided at the Hospital, and that at least some of the equipment used was provided by the Hospital. First Amended Complaint at ¶ 30. Moreover, and perhaps more important, Dr. Mitchell alleges that his agreement with the Hospital provided that he would treat Hospital patients; he does not allege that he used the Hsopital's facilities to treat his own patients, *Id.* In addition, Dr. Mitchell alleges that his agreement with the Hospital provided that he would receive in compensation for his services forty percent of the gross billings of the radiology department during the time the agreement was in effect. *Id.* Although it is not entirely clear that this method of payment tends to bolster Dr. Mitchell's assertion that, for Title VII purposes, he was an employee of the Hospital, the fact that

Dr. Mitchell was paid by the Hospital rather than by the patients he treated may very well support his position. In general, it may be inferred, from the facts alleged, that the Hospital enjoyed considerable control over "the means and manner" of Dr. Mitchell's performance. Thus, this is not a situation in which "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Accordingly, we reverse the district court's dismissal of his Title VII counts.

B

Dr. Mitchell also argues that even if he did not enjoy an employment relationship with the Hospital which was protected by Title VII, he nonetheless stated a Title VII claim by alleging that the Hospital's actions interfered with his employment opportunities with his patients. On the basis of the facts alleged, we cannot agree.

In *Lutcher*, we recognized that a Title VII plaintiff need not aver the existence of a protected employment relationship with the defendant, but rather could state a claim under Title VII by averring that a defendant's actions interfered "with an individual's employment opportunities with another employer." 633 F.2d at 883 n.3.[8] We also noted in *Lutcher*, however, that "there must be some connection with an employment relationship for Title VII protections to apply." *Id.* at 883. Here, Dr. Mitchell has not alleged any facts which would support a finding that his relationships with his patients or prospective patients are employment relationships for the purposes of Title VII. The *Lutcher* factors discussed above strongly suggest

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[8]This view is consistent with the positions of at least two other circuits. *See Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973); *Doe*, 788 F.2d 411.

that the traditional physician/patient relationship is not one of employee/employer and as such is not protected under Title VII. Because Dr. Mitchell has not averred that his relationships with his patients in any way diverge from the traditional physician/patient relationship, we hold that as a matter of law his allegations that the Hospital interfered with his relationships with his patients fail to state a claim for relief under Title VII. *See Beverley v. Douglas*, 591 F.Supp. 1321, 1328 (S.D.N.Y. 1984) (arriving at same conclusion); *but see Doe*, 788 F.2d at 425 (physician/patient relationship may be covered by Title VII).

C

Finally, Dr. Mitchell argues that the Hospital interferred with his employment relationship with the professional corporation of which he is the sole shareholder. We reject this argument because we believe that the relationship between an individual and his wholly owned professional corporation is not an employment relationship that Congress intended to protect under Title VII. *Gomez v. Alexian Bros. Hosp. of San Jose*, 698 F.2d 1019 (9th Cir. 1983), upon which Dr. Mitchell relies, is clearly distinguishable. *Gomez* involved a corporation that employed a number of doctors who rendered medical services as part of the corporation's group medical practice. *Id.* at 1020. In contrast, Dr. Mitchell is both the sole shareholder and sole employee of his professional corporation.

The parties shall bear their own costs on this appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

NO. C-86-5790 JPV

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WINSTON A. MITCHELL M.D., and
WINSTON A. MITCHELL M.D., INC.
Plaintiffs,
v.
FRANK R. HOWARD MEMORIAL HOSPITAL,
ROBERT HARRAH and STEVEN WENTWORTH, M.D.,
Defendants.

FILED APR 13 1987, WILLIAM L. WHITTAKER, CLERK
ENTERED IN CIVIL DOCKET 4/15 1987

ORDER GRANTING PLAINTIFFS' MOTION FOR RECONSIDERATION AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On April 2, 1987 this matter came before the Court on plaintiffs' motion pursuant to Rules 59 and 60 of the Federal Rules of Civil Procedure for reconsideration of and rehearing on the March 13, 1987 Order Granting Summary Judgment on counts 1 and 2 of plaintiffs' complaint. The motion was deemed submitted on the written pleadings and no appearance by counsel was entered.

Having reviewed the written briefs and other documentation which accompanied plaintiffs' motions, defendants' opposition and plaintiffs' reply, the Court makes the following findings:

(1) Plaintiffs' failure to plead facts regarding the Hospital's impact on interstate commerce, which are already at their disposal, was the result of a combination of neglect and miscalculation of the importance of such facts on the part of plaintiffs' counsel. In the interest of deciding this case on its merits, the Court finds that plaintiffs' counsel's carelessness in acquainting himself with the facts of the case were the result of excusable neglect.

(2) As a matter of law, neither the Hospital's general business activities nor its provision of radiology services which is allegedly "infected" with illegal activity have the substantial effect on interstate commerce necessary to invoke jurisdiction under the Sherman Act. *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980). Therefore, plaintiffs state no claim for violation of federal antitrust law.

Plaintiffs' claim for antitrust jurisdiction rests essentially upon two allegations: that the Hospital and the radiology department earn $5,000,000 and $600,000 in gross annual revenue respectively, and that approximately 30-50% of revenues for patient care travel in interstate commerce. Additionally, the Hospital and the radiology department purchase equipment and supplies from local dealers some of which, planitiffs claim, may be manufactured out of state.

While it is true that entities generating revenues far less than those generated by the Hospital or the radiology department in question have been found to have substantial impact on commerce, such determinations of jurisdiction are based not merely upon revenue figures, but on a broad aggregate of factors including proximity of the facility to regional centers of commerce or to other states, treatment of significant numbers of out-of-state patients,

purchase of equipment and supplies from interstate sources and interstate transfer of payment for patient care. Plaintiffs' reliance on interstate transfer of payments for patient care is an attempt to establish jurisdiction by reference to just one of the many factors to be considered in the jurisdictional determination. Furthermore, plaintiffs' emphasis on the Hospital's gross income in effect asks this Court to establish jurisdiction by creating a presumption at law that such revenues must necessarily have substantial impact upon interstate commerce. No such presumption presently exists, and the Court declines to expand anti-trust jurisdiction by creating one.

For the foregoing reasons plaintiffs' motion for reconsideration is GRANTED. Upon reconsideration defendants' motion for summary judgment is again GRANTED. IT IS SO ORDERED.

Date: April 13, 1987

J.P. VUKASIN, JR., JUDGE
UNITED STATES DISTRICT
COURT

NOTICE OF ORDER GRANTING PLAINTIFFS' MOTION FOR RECONSIDERATION AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(PROOF OF SERVICE BY MAIL-1013a, -2015.5 CCP)

I, the undersigned, hereby certify under penalty of perjury that I am over the age of 18 years and not a party to the within action; that my business address is 333 Market Street, San Francisco, California and that on this date I placed a true copy of the foregoing document in an envelope, and caused it to be sealed and deposited in the U.S. mail at San Francisco, California, with postage fully prepaid thereon, addressed in the manner set forth below.

Dated at San Francisco, Calif. on April 16, 1987.

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles, I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On November 28, 1988, I served the within Petition for Writ of Certiorari in re: "Winston A. Mitchell, M.D. vs. Frank R. Howard Memorial Hospital" in the United States Supreme Court, October Term 1988, No. .....;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, adressed as follows:

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San Francisco, CA 94105

All Parties required to be served have been served.

I certify, under penalty of perjury, that the foregoing is true and correct.

Executed on November 28, 1988, at Los Angeles, California

CE CE MEDINA

Supreme Court, U.S.
FILED
JAN 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-916

In The

Supreme Court of the United States

October Term, 1988

WINSTON A. MITCHELL, M.D.,
WINSTON A. MITCHELL, M.D., INC.,

Petitioners,

v.

FRANK R. HOWARD MEMORIAL HOSPITAL,
ROBERT HARRAH, STEVEN WENTWORTH, M.D.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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ISSUE

Whether the Court of Appeals correctly concluded under *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980) that respondent Hospital's activities, as a matter of practical economics, lacked a substantial effect on interstate commerce so as to establish jurisdiction under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2, where:

(1) The Hospital's former exclusive radiologist challenges the Hospital's decision, after competitive bidding, to award an exclusive one-year contract for such hospital-based services to another radiologist;

(2) The Hospital does not treat out-of-state patients;

(3) The Hospital's radiology department purchases all of its equipment and supplies within California; and

(4) The connection with interstate commerce upon which petitioner principally relies is the Hospital's receipt of Medicare, Medi-Cal and out-of-state private insurance payments, which patients have assigned to the Hospital.

PARTIES TO THE PROCEEDINGS

Plaintiffs and petitioners are WINSTON A. MITCHELL, M.D., and WINSTON A. MITCHELL, M.D., INC.[A]

Defendants and respondents are FRANK R. HOWARD MEMORIAL HOSPITAL, a California nonprofit public benefit corporation; ROBERT HARRAH, the chairman of the Hospital's board of directors; and STEVEN WENTWORTH, M.D., the radiologist for the Hospital.[B]

A Petitioner Mitchell has sued in his own name and that of his wholly-owned corporation. Since the Hospital's relationship was always with Dr. Mitchell, not his corporation, respondents will refer to petitioners in the singular.

B Robert Harrah has been and is represented separately from the Hospital and Dr. Wentworth, but respondents submit this joint brief in opposition to the petition.

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No. 88-916

In The

Supreme Court of the United States

October Term, 1988

WINSTON A. MITCHELL, M.D.,
WINSTON A. MITCHELL, M.D., INC.,

Petitioners,

v.

FRANK R. HOWARD MEMORIAL HOSPITAL,
ROBERT HARRAH, STEVEN WENTWORTH, M.D.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The decision and opinion of the Ninth Circuit Court of Appeals is published at 853 F.2d 762. Petition Appendix ("App.") A. The judgment and memorandum of decision of the United States District Court for the Northern District of California are unreported. App. B. Petitioner did not request a rehearing from the Ninth Circuit.

JURISDICTION

The decision of the Ninth Circuit was filed on August 9, 1988. This Court granted petitioner an extension of time to November 28, 1988, in which to file and serve a petition for writ of certiorari. The petition was filed and served by mail on November 28, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case arises from the Hospital's decision, after competitive bidding which included petitioner, to replace petitioner's exclusive oral agreement to provide hospital-based radiology services with an exclusive one-year written contract for such services with another radiologist. Petitioner claims that the exclusive written contract establishes a tying arrangement and constitutes a denial of essential facilities in violation of sections 1 and 2 of the Sherman Act. 15 U.S.C. §§ 1, 2. The district court entered summary judgment for the Hospital on the antitrust claims on the ground that the Hospital's activities did not, as a matter of practical economics, have a sufficient impact on interstate commerce to support jurisdiction under the Sherman Act. Relying upon this Court's seminal decision in *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980), the Ninth Circuit Court of Appeals affirmed, also finding that petitioner had failed to show that the Hospital's activities had a sufficient effect on interstate commerce as a matter of practical economics to support jurisdiction under the Sherman Act.

Frank R. Howard Memorial Hospital is a small, 38-bed facility located in the rural town of Willits (pop. 4,200), Mendocino County, California, more than 150 air miles (and almost 250 road miles) from the nearest state border and over 100 miles from San Francisco, the nearest urban center. The Hospital serves an exclusively California patient population. From 1983 through 1986, virtually none of the Hospital's patients were from out of state. As required by California law, the Hospital provides hospital-based radiology services, primarily on an out-patient basis, to its patients. All of the Hospital's radiology equipment and supplies, including film and chemicals, are procured in California. The Hospital's gross annual revenues are approximately $5 million; the annual gross revenues of the Hospital's radiology department are approximately $600,000. Although the Hospital's overall Medicare reimbursement revenue is higher, only approximately 23 percent of the Hospital's annual gross radiology revenue, or $142,762 for FYE 1984 and $146,012 for FYE 1985, is derived from its patients' Medicare entitlements which are assigned to the Hospital. Also by assignment, the Hospital receives revenue from private out of state insurers for radiology services rendered to its local patients.

Measured against other hospitals, Frank R. Howard Memorial Hospital has an insignificant impact outside its local community. The average hospital in the United States has 168 beds, almost five times as large as respondent. Hatton, "Urban and Rural Hospitals," 8 Health Care Financing 77, 80 (Winter 1986). Approximately 90 percent of acute-care hospitals in California are larger than Howard Memorial, and most of the other hospitals

are only slightly smaller. American Hospital Association Guide to the Health Care Field (1984) at A22-A43. The Hospital's annual gross revenue is only 15.3 percent of that of the average California hospital, and only 10.1 percent of that of the average hospital in San Francisco. California Health Commission Quarterly Finance and Utilization Report (1st Quarter 1985) at 40, 43-44, 70. In 1983, the average individual radiologist nationwide received $116,679 from Medicare reimbursements. Burney, "Medicare Physicians' Services," 7 Health Care Financing Review 81, 85 (Fall 1985). This is approximately 82 percent of the Hospital's total Medicare reimbursement for radiology services in 1984.

Petitioner Winston A. Mitchell, M.D., was the Hospital's exclusive radiologist under an oral agreement from July 1980 through August 31, 1985. The Hospital terminated the agreement effective August 31, 1985, because of irresolvable differences that had arisen with petitioner over the nature and terms of his services, including his rejection of the Hospital's proposed written contract and his unilateral decision, notwithstanding the Hospital's express requirement of full-time radiology services for its patients, to provide only part-time services so that he could also work at another hospital almost 100 miles away in Garberville, California. The Hospital's action had no effect on his position at the Garberville hospital. Moreover, contrary to petitoner's assertion, neither the Hospital nor its Medical Staff took any action against petitioner's Medical Staff membership or clinical privileges. Petitioner retained his privileges at the Hospital and, had he chosen to do so, could have continued to

provide consultation services upon the request of other physicians or their patients.

Following the termination of petitioner's contract, the Hospital began a search for a new radiologist and engaged in a seven-month inquiry into whether it should provide hospital-based radiology services through an open staff or an exclusive contract. The Hospital's investigation overwhelmingly supported an exclusive contract: not only would the Hospital be able to assure full-time, high-quality radiology services through an exclusive contract but, because the Hospital's patient census would support only one full-time radiologist, all of the seriously considered applicants, except petitioner who already had a de facto monopoly on the Hospital's radiology services, refused to consider the position without an exclusive arrangement. Based on this study, the Hospital's Board of Directors concluded that a short-term exclusive contract would best serve the patient care standards and goals of the Hospital. Accordingly, on April 2, 1986, the Board awarded a one-year written contract, virtually identical to that which petitioner had previously rejected, to respondent Steven Wentworth, M.D.

Seven months earlier, however, on August 30, 1985, petitioner had sued the Hospital in the Mendocino County Superior Court seeking, among other things, to enjoin the Hospital from entering into an exclusive contract for hospital-based radiology services. On three separate occasions, the state court rejected petitioner's application for preliminary injunctive relief, finding each time that he had failed to show a reasonable probability that the proposed exclusive contract was unlawful. In fact, the provision of hospital-based radiology services

through an exclusive arrangement is common throughout the United States and has been authorized by statutory or case law in California for over 20 years.[1]

On October 7, 1986, petitioner filed the instant action, incorporating the claims asserted in the state proceeding and asserting further that the exclusive radiology contract violated the Sherman Act by creating an unlawful tying arrangement and denying an essential facility. Relying on *McLain*, the district court granted summary judgment to the Hospital on the antitrust claims on the ground that petitioner had failed to show that either the Hospital's overall business activities or its provision of radiology services substantially affected interstate commerce so as to establish jurisdiction under the Sherman Act. App. 2b-3b.[2] Rejecting petitioner's main contention

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[1] See Cal. Welfare & Inst. Code § 14087.28(a); *Centeno v. Roseville Community Hospital*, 107 Cal. App. 3d 62, 71-73, 167 Cal. Rptr. 183 (1979) (hg. den.); *Lewin v. St. Joseph Hospital of Orange*, 82 Cal. App. 3d 368, 146 Cal. Rptr. 892 (1978); *Letsch v. Northern San Diego County Hospital District*, 246 Cal. App. 2d 673, 55 Cal. Rptr. 118 (1966) (hg. den.); *Blank v. Palo Alto-Stanford Hospital Center*, 234 Cal. App. 2d 377, 44 Cal. Rptr. 572 (1965) (hg. den.).

[2] Contrary to petitioner's suggestion, summary judgment is as available in antitrust cases as in any other matter. See, *e.g.*, *Doe v. St. Joseph's Hospital of Ft. Wayne*, 788 F.2d 411 (7th Cir. 1986); *Stone v. William Beaumont Hospital*, 782 F.2d 609 (6th Cir. 1986); *Seglin v. Esau*, 769 F.2d 1274 (7th Cir. 1985). Indeed, this Court has recently emphasized the availability of summary judgment in all actions, including antitrust cases, where the evidence adduced by the parties establishes that the issues may be properly resolved without the necessity for a trial. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-252 (1986);

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that the Hospital's receipt of Medicare and out-of-state private insurance funds established jurisdiction as a matter of law, the district court observed:

> "Determinations of jurisdiction are based not merely upon revenue figures, but on a broad aggregate of factors including proximity of the facility to regional centers of commerce or to other states, treatment of significant numbers of out of state patients, purchase of equipment and supplies from interstate sources and interstate transfer of payment for patient care." *Ibid.*

The Ninth Circuit affirmed. Relying on *McLain*, as well as other decisions of this Court and of the courts of appeals, the Ninth Circuit correctly recognized that, in order to establish jurisdiction under the Sherman Act, petitioner was required to show that the Hospital's local activities nonetheless have "an effect on some other appreciable activity demonstrably in interstate commerce." 853 F.2d at 764, App. 4a, quoting *McLain*, 444 U.S. at 242. Further explaining this principle, the Ninth Circuit also recognized, correctly, that whether a hospital's activities substantially affect interstate commerce is decided "as a matter of practical economics" based on a consideration of a "broad aggregate of factors" and is "a highly fact-based question calling for common sense judgment."

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Celotex Corp. v. Catrett, 477 U.S. 317 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Summary judgment is especially appropriate with respect to claims, such as those here, that the courts have found to be, at best, on the fringe of the Sherman Act. See, *e.g.*, *Doe v. St. Joseph's Hospital*, 788 F.2d at 417 n.10; *Jaffee v. Horton Memorial Hospital*, 680 F. Supp. 125, 127-128 (S.D.N.Y. 1988).

Id. at 764-765, App. 5a, 6a; see also *McLain*, 444 U.S. at 246; *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 745 (1976). Applying these principles to the particular facts of this case, and comparing its judgment with those reached in other hospital antitrust cases, the Ninth Circuit concluded:

> "The cases in which courts have found Sherman Act jurisdiction involve hospitals whose activities appear to have a much greater effect on interstate commerce than the activities of the hospital in this case. In sum, we hold that 'as a matter of practical economics' Dr. Mitchell has failed to make a sufficient showing of effect on interstate commerce to establish Sherman Act jurisdiction." 853 F.2d at 765-766; App. 8a.

ARGUMENT

Petitioner asserts that the federal courts are confused and inconsistent regarding the proper jurisdictional standard under the Sherman Act, and requests this Court to grant review to clarify the proper jurisdictional test. Petitioner, however, ignores this Court's leading decisions on the issue; disregards the essential nature of the test established by this Court and followed here by the Ninth Circuit; and disregards the significant differences in the facts of those cases he incorrectly asserts are indistinguishable from this case. Petitioner's contentions, therefore, lack any merit.

The Sherman Act prohibits contracts, combinations or conspiracies "in restraint of trade or commerce among the several states," as well as monopolies of "any part of the trade or commerce among the several states." 15 U.S.C. §§ 1, 2. The Sherman Act is concerned with the

integrity of interstate markets and is, therefore, "keyed directly to effects on interstate markets . . . ." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194 (1974).

The threshold inquiry in every federal antitrust case, therefore, is whether the plaintiff has shown a sufficient jurisdictional nexus between interstate commerce and the defendants' activities. *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 742 n.1; *Stone v. William Beaumont Hosp.*, 782 F.2d 609, 613 (6th Cir. 1986). In *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 242 (1980), this Court held that a plaintiff must establish jurisdiction under the Sherman Act by pleading and showing "either that the defendants' activity is itself in interstate commerce or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce." Further explaining the relevant inquiry, this Court stated:

> "To establish federal jurisdiction in this case, there remains only the requirement that respondents' activities which allegedly have been infected by a price-fixing conspiracy be shown 'as a matter of practical economics' to have a not insubstantial effect on the interstate commerce involved." *Id.* at 246.

See also *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195 [the restraint in question must "substantially and adversely affect interstate commerce"]; *Rasmussen v. American Dairy Association*, 472 F.2d 517, 522-523 (9th Cir. 1973), cert. denied 412 U.S. 950 (1973) [the regulated conduct must have a "substantial economic effect upon interstate commerce" or a "real and substantial relation to the national interest"].

This Court has repeatedly recognized and emphasized that the jurisdictional inquiry requires a practical and realistic economic judgment which is grounded in a consideration of the particular facts of each case. *McLain*, 444 U.S. at 246, quoting *Rex Hospital*, 425 U.S. at 745 [the defendant's infected activities must have a substantial effect on interstate commerce "as a matter of practical economics"]; *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 784 n.11 (1975) ["It is in a practical sense that we must view an effect on interstate commerce."]; *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41-42 (1937) ["We have often said that interstate commerce itself is a practical conception. It is equally true that interference with that commerce must be appraised by a judgment that does not ignore actual experience."]. As the Ninth Circuit observed in *Rasmussen*, 472 F.2d at 523-524: "Whether the requisite 'substantial economic effect' or 'substantial relation to the national interest' is present or absent is a practical, case-by-case economic judgment, not a conclusion derived from application of abstract or mechanistic formulae" or a " 'technical legal conception,' divorced from economic reality."

While decrying the supposed absence of an articulated standard for the assessment of Sherman Act jurisdiction, petitioner proposes just such a "mechanistic formula" by his uncritical reliance on the amount of the Hospital's Medicare reimbursement. As the above authorities make clear, however, the very nature of the Sherman Act precludes a neat, quantifiable jurisdictional standard. Rather, the jurisdictional standards this Court articluated in *McLain* are inherently and necessarily flexible. Precisely because the jurisdictional determinations

must be grounded in a "broad aggregate of factors" characterizing the practical economic realities of each case, the proper test depends upon the experience, wisdom and judgment of the courts. See, *e.g.*, *Feminist Women's Health Center v. Mohammad*, 586 F.2d 530, 540-541 (5th Cir. 1978), cert. denied 444 U.S. 924 (1979); *Doctors, Inc., v. Blue Cross of Greater Philadelphia*, 490 F.2d 48, 51 (3d Cir. 1973). Accordingly, so long as the lower courts reasonably apply the correct standards and principles set forth in *McLain* and its predecessors, as the Ninth Circuit did in this case, further review by this Court is neither necessary nor appropriate.

In this case, the Ninth Circuit correctly understood and articulated these principles in its consideration of the jurisdictional issue. Relying on *McLain*, the Ninth Circuit recognized that the existence of jurisdiction under the Sherman Act turned on whether, "as a matter of practical economics," petitioner demonstrated that the Hospital's essentially local activities "affect[ed] interstate commerce." 853 F.2d at 764, App. 6a. The court further correctly recognized that the jurisdictional inquiry necessarily considers a "broad aggregate of factors" and is a "highly fact-based question calling for common sense judgment." *Id.* at 764, 765, App. 5a, 6a. Thus, the Ninth Circuit's opinion is entirely consistent with the principles articulated by this Court and contains absolutely no doctrinal error which would warrant this Court's review.

The Ninth Circuit also correctly applied these principles in affirming the district court's judgment. Rejecting petitioner's suggestion that it could view the jurisdictional inquiry narrowly and find jurisdiction on the basis of a single factor – the Hospital's receipt of funds from

Medicare and out-of-state private insurers,[3] the Ninth Circuit correctly followed the repeated admonitions of this Court and of the other circuits in considering a broad range of factors describing the practical economic realities of the operation of the Hospital and its radiology department. 853 F.2d at 764-765, App. 5a-6a.

Most importantly, the court found that the Hospital is a small, rural hospital, located far from the nearest state border and urban center, which does not provide services to out-of-state patients.[4] Also, while some of the Hospital's non-radiology supplies may come from out of state, the Hospital procures all of the equipment, film, chemicals and other supplies for its radiology department, the locus of petitioner's claims of unlawful

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[3] Petitioner includes the Hospital's Medi-Cal reimbursement in his accounting. (Medi-Cal is California's Medicaid program.) However, while Medi-Cal is funded in part by federal monies, these funds are included in the *state's* budget. The Hospital receives its Medi-Cal reimbursement, which is in any event assigned by the patients, entirely from the State of California.

[4] Petitioner argues that the record is allegedly ambiguous as to whether the Hospital serves any out-of-state patients or only serves less than one percent out-of-state patients. The record is not ambiguous, but the distinction is trivial in any case and would not change the result. See, *e.g., Pariser v. Christian Health Care Systems, Inc.*, 816 F.2d 1248, 1252-1253 (8th Cir. 1987) [no Sherman Act jurisdiction where, among other things, Illinois residents comprised 98 percent of hospital patients]. Moreover, since petitioner failed to request rehearing on this purportedly important issue, he should not be heard to rely on this alleged error in his petition to this Court.

antitrust activity, from sources in California.[5] Finally, although the Hospital receives certain revenues from Medicare and out-of-state private third-party insurance payors, this revenue is incidental to the Hospital's principal function, which petitioner ignores, the provision of services to patients. Indeed, petitioner fatally misconceives the nature of this revenue, for these funds derive from patient entitlements which are assigned to the Hospital for payment, not from the provision of medical services by the Hospital to the insurers or the federal government. The courts have accordingly rejected undue reliance on reimbursement to support jurisdiction under the Sherman Act in the hospital context: "The mere fact that monies are received from out of state does not establish that the activity 'infected by illegality' has any significant effect on interstate commerce." *Mamakos v. Huntington Hospital*, 653 F. Supp. 1447, 1451 (E.D.N.Y. 1987); see also *Hayden v. Bracy*, 744 F.2d 1338 [even with other factors, Eighth Circuit held that 33% Medicare and

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[5] Petitioner's claim that he needed more discovery to determine the quantity of supplies that were manufactured by or that the Hospital purchased from out-of-state sources is equally meritless. The Ninth Circuit expressly considered and correctly rejected petitioner's contention that this information would change its analysis of the jurisdictional issue. 853 F.2d at 765 n.4, App. 6a. Moreover, petitioner has personal knowledge of the Hospital's activities through his six-year tenure as the Hospital's exclusive radiologist, and received substantial discovery regarding the Hospital's finances in the state proceeding filed over a year before this federal action. In any event, that petitioner may not have received as much discovery as he might have wished is not a persuasive, let alone compelling, basis for this Court's review.

88% third-party payor reimbursement were insufficient to establish jurisdiction].

To hold otherwise, as petitioner advocates, would effectively isolate this factor from the "broad aggregate of factors" necessary for a proper determination of the practical economic realities of the jurisdictional issue. To hold otherwise would necessarily place all hospitals and clinics, and virtually all individual physicians, in interstate commerce for purposes of the Sherman Act, thereby allowing the federal courts to be inundated with antitrust claims based on inherently local disputes over the terms and conditions of health care delivery in communities throughout the United States. Indeed, to hold otherwise would place any business in interstate commerce that accepted consumer credit cards in its otherwise local transactions.

The Ninth Circuit and the district court in this case properly rejected these implications of petitioner's theory in holding, in light of the practical economic realities of this case, that the Hospital's replacement of one exclusive radiologist with another exclusive radiologist was neither in nor substantially affected interstate commerce for purposes of Sherman Act jurisdiction.

Furthermore, contrary to petitioner's contention, the circuits are not split as to the essential extent of jurisdiction under the Sherman Act. Indeed, following *McLain*, the circuits have viewed individual antitrust claims in the Hospital context with increasing skepticism and, on stronger facts than presented here, have rejected jurisdictional claims substantially similar to those petitioner

asserts in this case.[6] For example, in *Doe v. St.Joseph's Hospital*, 788 F.2d 411, 417, the Seventh Circuit held that the plaintiff had failed to establish jurisdiction under the Sherman Act notwithstanding allegations that the defendant hospital treated out-of-state patients, shared medical information and training across state lines, purchased medical supplies out of state and received reimbursement from out-of-state insurance programs. See also, *Seglin v. Esau*, 769 F.2d 1274. Similarly, in *Stone v. William Beaumont Hospital*, 782 F.2d 609, the Sixth Circuit found an insufficient involvement or effect on interstate commerce to support jurisdiction under the Sherman Act where the plaintiff cardiologist had alleged that he treated and received income from out-of-state patients and that the defendant purchased and received supplies and income from out-of-state sources. Again, in *Michigan State Podiatry Assn. v. Blue Cross and Blue Shield of Michigan*, 671 F. Supp. 1139, 1153-1155 (E.D. Mich. 1987), the court

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[6] See, *e.g.*, *Furlong v. Long Island College Hospital*, 710 F.2d 922 (2d Cir. 1983); *Capili v. Shott*, 487 F. Supp. 710 (S.D. W.Va. 1978), *aff'd* 620 F.2d 438 (4th Cir. 1980); *Sarin v. Samaritan Health Center*, 813 F.2d 755 (6th Cir. 1986); *Stone v. William Beaumont Hospital*, 782 F.2d 609 (6th Cir. 1986); *Doe v. St. Joseph's Hospital of Ft. Wayne*, 788 F.2d 411 (7th Cir. 1986); *Seglin v. Esau*, 769 F.2d 1274 (7th Cir. 1985); *Hayden v. Bracy*, 744 F.2d 1338 (8th Cir. 1984); *Jaffe v. Horton Memorial Hospital*, 680 F. Supp. 125 (S.D.N.Y. 1988); *Litman v. A. Barton Hepburn Hospital*, 679 F. Supp. 196, 199-202 (N.D.N.Y. 1988); *Michigan State Podiatry Assn. v. Blue Cross and Blue Shield of Michigan*, 671 F. Supp. 1139, 1153-1155 (E.D. Mich. 1987); *Mamakos v. Huntington Hospital*, 653 F. Supp. 1447 (E.D.N.Y. 1987); *Wright v. Southern Mono Hospital Dist.*, 631 F. Supp. 1294 (E.D. Cal. 1986); *Kling v. St. Paul's Fire & Marine Ins. Co.*, 626 F. Supp. 1285 (C.D. Ill. 1986).

rejected claims that Blue Cross/Blue Shield's cost containment plan constituted an unlawful price fixing scheme substantially affecting interstate commerce even where it contracted with and paid out-of-state physicians for services to its subscribers, its health care plans covered employees whose products were traded widely in interstate commerce, and it administered large amounts of federal and out-of-state private health care funds. Finally, in *Wright v. Southern Mono Hospital Dist.*, 631 F. Supp. 1294, 1318-1319 (E.D. Cal. 1986), the court held that a hospital's exclusive contract for emergency room services did not have a substantial effect on interstate commerce as a matter of practical economics although 4.2% of the ER patients listed out-of-state addresses, 10% of visitors to the nearby Lake Tahoe ski area on the Nevada-California border were from out of state, the hospital received substantial reimbursement from federal and out-of-state private insurers, and the hospital purchased 80% of its equipment and supplies from out of state. The Ninth Circuit's decision in this case, therefore, is entirely consistent with those from the other circuits.

In an attempt to support his claim that the circuits are ostensibly split as to the extent of Sherman Act jurisdiction, petitioner relies on an array of cases, both within the outside the health care context, which found jurisdiction under circumstances purportedly indistinguishable from this case. The courts found jurisdiction in these cases, however, either based on activities in the flow of interstate commerce, or based on an aggregate of factors substantially affecting interstate commerce exceeding that which is presented here. For example, in *Tarelton v. Meharry Medical College*, 717 F.2d 1523 (6th Cir. 1983), a

post-*McLain* case which involved a physician's antitrust challenge to a required faculty medical practice plan, the Sixth Circuit found that the cumulative impact of the defendant's alleged involvement in interstate commerce supported jurisdiction under the Sherman Act where the defendant was a renowned, nationally-based Black medical college, students and faculty were recruited and came from out of state, a substantial portion of the college's patients were from out of state, supplies and equipment for the medical services provided through the challenged medical practice plan were purchased from out-of-state sources, and private and federal funds came from out of state. Similarly, in *Doctor's Inc. v. Blue Cross of Greater Philadelphia*, 490 F.2d 48, a pre-*McLain* case which involved a hospital's antitrust challenge to Blue Cross' domination of the greater Philadelphia market, the court found jurisdiction where defendant Blue Cross had a subscriber base of 2,380,000 persons and an annual distribution of $208,635,550 throughout both Pennsylvania and New Jersey.[7]

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[7] Equally inappropriate is petitioner's reliance on *Feminist Women's Health v. Mohammad*, 586 F.2d 530, 539-541 [Fifth Circuit explicitly emphasizes that the jurisdiction analysis involves an inherently flexible consideration of an aggregate of factors and found jurisdiction based, in part, on defendant's status as a regional interstate center for women's health care and its substantial reliance on the interstate travel of patients]; *Englert v. City of McKeesport*, 736 F.2d 96, 97 (3d Cir. 1984) [alleged unlawful exclusive electrical inspection contract did not affect interstate commerce where much of the construction

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The Tenth Circuit's decisions in *Crane v. Intermountain Health Care Inc.*, 637 F.2d 715 (10th Cir. 1980) (en banc) and *Mishler v. St. Anthony's Hospital Systems*, 694 F.2d 1225 (10th Cir. 1981), are similarly inapposite. In *Crane*, the court found that the complaint established jurisdiction where the plaintiff had alleged numerous specific facts showing the defendant hospital's involvement in interstate commerce, including the hospital's provision of pathology services for numerous out-of-state patients and purchase of pathology supplies from out of state. 637 F.2d at 725. Similarly, in *Mishler*, which also arose on the pleadings, the court found jurisdiction in a physician's antitrust challenge to the hospital's emergency room referral procedures based on the cumulative effect of a combination of factors affecting interstate commerce, including the hospital's treatment of out-of-state patients and its operation of an interstate air ambulance service, as well as the purchase of out-of-state supplies and receipt of out-of-state insurance premiums. 694 F.2d at 1227.

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in western Pennsylvania came from out of state, the construction project owners were located and paid their fees from out of state, much of the necessary labor, material and other services came from out of state, and the projects were directly financed by the Department of Housing and Urban Development]; *J.P. Mascaro & Sons, Inc. v. Wm. J. O'Hara, Inc.*, 565 F.2d 264, 265-266 (3d Cir. 1977) [plaintiff and defendant refuse companies served federal and out-of-state customers and were paid from out of state for services to customers; defendants' operations were financed by out-of-state lenders; and defendants purchased equipment manufactured out of state].

Finally, petitioner has consistently misinterpreted the Ninth Circuit's decision in *Palmer v. Roosevelt Lake Log Owners Association, Inc.*, 651 F.2d 1289 (9th Cir. 1981) and *Western Waste Service Systems v. Universal Waste Control*, 616 F.2d 1094 (9th Cir. 1980), cert. denied 449 U.S. 869 (1980). As the Ninth Circuit in the instant case correctly noted, 853 F.2d at 765 n.6, App. 8a, jurisdiction under the Sherman Act was predicated in *Palmer* on an alleged burden imposed directly on the flow of interstate commerce where the defendants allegedly attempted to monopolize the timber salvage trade in Lake Roosevelt, Washington, and 50 to 90 percent of the millions of board feet of salvage would be used directly in the flow of an interstate market supplying 10 percent of the nation's timber. 651 F.2d at 1290, 1292. Similarly, in *Western Waste*, the Ninth Circuit found jurisdiction with respect to an alleged conspiracy to control the rubbish collection business in Phoenix, Arizona, where the defendant hauled significant amounts of scrap materials for out-of-state shipments, the defendant transferred $300,000 monthly to an out-of-state management company and financed its operation through out-of-state lenders, the defendant had attempted to terminate the plaintiff's dealership for an out-of-state equipment supplier and the defendant purchased equipment from out of state. 616 F.2d at 1097-1098.

Significantly, nothing approaching the substantial involvement or effect on interstate commerce alleged in the cases upon which petitioner relies is presented here. Indeed, in stark contrast to these cases, the Hospital's involvement with or effect on interstate commerce is minimal. Regardless of whether the Hospital receives

Medicare and private insurance payments from out of state pursuant to its patients' assignments, the Hospital remains a small, isolated rural facility which provides no services to out-of-state patients and purchases no radiology equipment or supplies from out-of-state sources. It would be difficult to conceive of a health care facility, or even an individual physician, which has less involvement with interstate commerce. As the courts have in various formulations observed: "The reach of Sherman Act jurisdiction, though expansive, is not without limit." *Hayden v. Bracy*, 744 F.2d 1338, 1343. The purely local dispute in this case over how the Hospital's state-required radiology services should be provided so as to best serve the Hospital's patients is precisely that which should not fall within the purview of the Sherman Act.[8]

This Court has repeatedly recognized that even Congress' power to regulate entire industries under the Commerce Clause is limited by the basic principles of federalism inherent in our form of government. See generally, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 581-586 (1985) (O'Connor, J., dissenting). As Chief Justice Hughes observed 50 years ago in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37:

> "Undoubtedly the scope of this [commerce] power must be considered in the light of our dual system of

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[8] The appropriately available vehicle for plaintiff's allegations is his claim under California's antitrust law, the Cartwright Act, Cal. Bus. & Prof. Code, §16600 *et seq.*, which is closely analogous to the Sherman Act. See First Amended Complaint, Count 3. Since the state remedy is adequate, there is no preference for the federal action. *Salveson v. Western States Bank Card Assn.*, 731 F.2d 1423, 1427 (9th Cir. 1984).

> government and may not be extended so as to embrace effects on interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

The courts' jurisdictional inquiry under the Sherman Act is not merely infused by the same limiting principle, but is necessarily even more circumscribed, for it focuses on the activities of an individual party rather than upon Congress' power to regulate an entire industry or field. In such an inquiry, the courts do not review whether Congress had a rational basis for its enactment of a statute, but determine in the first instance whether, as a matter of practical economics, a party's individual activities have the required real, substantial and material effect on interstate commerce to support jurisdiction under the Act. See *United States v. Darby*, 312 U.S. 100, 120 (1941); *Rasmussen v. American Dairy Association*, 472 F.2d 517, 522-524.[9] Accordingly, the jurisdictional standards articulated by this Court in *McLain* and its predecessors seek to assure that the federal courts will review under the Sherman Act only those alleged restraints which genuinely and substantially affect the integrity of interstate markets.

In this case, the Ninth Circuit and the district court correctly articulated and applied those standards. Both

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[9] For this reason, petitioner's reliance on the Health Care Quality Improvement Act of 1986, 42 U.S.C. §11101 *et seq.*, is entirely inapposite. Similarly, *Katzenbach v. McClung*, 379 U.S. 294 (1964), which considered the constitutionality of Congress' enactment of portions of the Civil Rights Act of 1964, not whether the individual party was in or substantially affected interstate commerce for purposes of the Sherman Act, is irrelevant to the proper inquiry under the Sherman Act.

courts determined that neither the alleged unlawful exclusive contract with Dr. Wentworth for hospital-based radiology services, nor the Hospital's activities "infected" by the alleged unlawful contract, has, as a matter of practical economics, a real, material or substantial effect on the integrity of interstate commerce to support jurisdiction under the Sherman Act. The Ninth Circuit's decision, which affirmed the judgment of the district court, was correct and offers no compelling doctrinal or equitable reason for this Court's further review.

CONCLUSION

For the reasons discussed above, respondents respectfully request that the petition for writ of certiorari be denied.

Dated: January 23, 1989

Respectfully submitted,

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No. 88-916

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

WINSTON A. MITCHELL, M.D.;
WINSTON A. MITCHELL, M.D., INC.,
Petitioners

vs.

FRANK R. HOWARD MEMORIAL HOSPITAL;
ROBERT HARRAH; STEVEN WENTWORTH, M.D.,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT

Respondents proffer a novel theory in anti-trust interstate commerce jurisdiction, one which the Ninth Circuit seems to have adopted. While paying lip service to the concept that jurisdictional determinations must be grounded in a "broad aggregate of factors", petitioners then urge this Court to conclude that where there are an aggregate of factors, each of them must independently meet the test of having a not insubstantial effect on interstate commerce or have the entire matter fail for lack of jurisdiction.

The adoption of this test would virtually preclude every hospital in the United States that was not located adjacent to a state border, or which did not have a significant

tertiary care practice that would attract patients from other states, from recourse to Federal anti-trust protection.

To permit this analysis to stand as the rule of law for determining jurisdiction would be to effectively bar most hospitals in the United States from being subject to Federal anti-trust scrutiny, whether by private litigants or Federal enforcement agencies.

The threat of the Ninth Circuit's decision in this case to the availability of Federal jurisdiction over hospital anti-competitive behavior is no clearer shown than in the recent Ninth Circuit decision in *Oltz v. St. Peter's Community Hospital,* 816 F2d 1440 (1988). In *Oltz,* the Ninth Circuit affirmed a district court decision which found anti-competitive behavior involving the exclusion of nurse anesthetists from providing anesthesia services by a conspiracy of the medical staff and the hospital to bar the nurse anesthetists in an effort to eliminate competition with physician anesthesiologists.

The *Oltz* decision is not one which, petitioners respectfully submit, could be considered one "based on inherently local disputes over terms and conditions of health care delivery" as respondents like to characterize physician-hospital anti-trust disputes. Rather it is one affecting the very nature of the right to compete in the market for the delivery of health care. The *Oltz* decision was rendered by a panel in the Ninth Circuit different than that which rendered the opinion in the instant case. Seizing on the decision in the instant case which apparently bars access to Federal anti-trust protection for rural hospitals, the defendants in *Oltz* have petitioned for an En Banc hearing to overturn the Ninth Circuit's decision in that case based solely on the Ninth Circuit's ruling in the

instant case. (Copy of petition annexed hereto as Exhibit A).

Petitioners are at a loss to provide any clearer evidence of the split within the Ninth Circuit itself or the threat to Federal enforcement of anti-trust laws to protect free and open competition for the delivery of health care services in the United States than the *Oltz* case and the current attempt by the unsuccessful defendants in that case to sweep away the determination of a district court and the Ninth Circuit by the invocation of the Ninth Circuit's sweeping rule in the instant case barring rural hospital access to Federal courts.

Finally, respondents conclusion that the circuits are not split as to the essential extent of jurisdiction under the Sherman Act is highly misleading. Invoking this Court's decision in *McLain v. Real Estate Board of New Orleans*, 444 US 232 (1980), respondent's cite this Court to a series of cases from the Seventh, Sixth and Second Circuits[1] which advocate an interpretation of *McLain* which has been, heretofore, rejected by the Ninth Circuit. Respondent's attempt to harmonize the split in the Circuits serves, rather, to highlight the distinction.

---

[1]Most notably *Furlong v Long Island College Hospital*, 710 F2d 922 (2nd Cir. 1983).

CONCLUSION

For the reasons discussed above, respondents respectfully request that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TAFFORD E. OLTZ,
Plaintiff-Appellee,
v.
ST. PETER'S COMMUNITY HOSPITAL,
Defendant-Appellant.

Petition of St. Peter's Community Hospital for Rehearing and Suggestion for En Banc Hearing Under F.R.A.P. Rules 40 and 35(b)

Case Nos. 87-3944
87-3945
DC No. CV-81-271-H-RES

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PETITION OF ST. PETER'S COMMUNITY HOSPITAL FOR REHEARING AND SUGGESTION FOR EN BANC HEARING UNDER F.R.A.P. RULES 40 AND 35(b)

POINTS OF LAW AND FACT

A. THE COURT LACKS JURISDICTION UNDER MITCHELL.

The panel exercised jurisdiction over St. Peter's Community Hospital ("St. Peter's") without a proper factual basis in direct conflict with a recent decision by a different panel of the Circuit. *Mitchell v. Frank R. Howard Memorial Hosp.*, 853 F.2d 762 (9th Cir. 1988), *cert. petition filed*, (Dec. 1988) (Appendix ["App."] 25).

B. THERE IS NO PROOF OF A SIGNIFICANT ADVERSE IMPACT ON INTERSTATE COMMERCE UNDER KAPLAN v. BURROUGHS CORP.

The *St. Peter's* decision (App. 1) directly conflicts with the well-settled principle that plaintiff in a Sherman Act case must prove a "not insignificant adverse impact" on interstate commerce in the relevant market. *Kaplan v. Burroughs Corp.*, 611 F.2d 286 (9th Cir. 1979) (App. 31). *See also Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) (App. 42). No such impact on the market for providers of anesthesia services (not a general hospital market) has been shown.

C. THE DECISION CONFLICTS WITH SUPREME COURT AND OTHER CIRCUIT RULINGS ON THE RELEVANT MARKET.

The *St. Peter's* decision, by using a hospital or patient market rather than the market in which anesthesia providers compete for jobs, directly contradicts decisions by the United States Supreme Court and the Seventh Circuit.

Jefferson Parish Hospital Dist. No. 2 v. Hyde, supra, 466 U.S. 2 (1984); *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473 (7th Cir. 1988), *cert. petition filed*, (July 1988). The *St. Peter's* decision is the only decision research has yielded in which an exclusive hospital contract with medical service providers has been struck down. *See Jefferson Parish, supra*; *Collins, supra*; *Drs. Steuer & Latham PA v. Nat. Med. Ent.*, (unpublished dec. 4th Cir. 1988), *aff'g.*, 672 F.Supp. 1489 (D.S.C. 1987) (App. 88). These striking conflicts justify rehearing en banc.

STATEMENT OF THE CASE

St. Peter's is the only hospital offering a full range of services in Helena, "one of Montana's smaller cities." (Slip Opinion ["Sl.Op."] at 14554, App. 1). Helena has a population of 24,800. St. Peter's is located 90 miles from Great Falls, 95 miles from Bozeman, 64 miles from Butte, 115 miles from Missoula, 224 miles from Billings and 172 miles from Yellowstone National Park. State and Canadian borders lie beyond those distances.*

The case arises from St. Peter's decisions to create a Department of Anesthesia staffed by M.D. anesthesiologists, to enter an exclusive contract with anesthesiologists to staff the department and provide anesthesia services at the hospital and to terminate a month-to-month billing agreement (but not hospital privileges) with Tafford E. Oltz, a certified registered nurse anesthetist ("CRNA").

---

*Pursuant to Rule 201 of the Federal Rules of Evidence, the Court is invited to take notice of these geographic and demographic facts, some of which are in the record. A map showing the location of hospitals within 115 miles of St. Peter's is appended at App. 94. The map is not part of the record. Ninety percent of St. Peter's patients come from its home county, Lewis and Clark, and from the northern portion of Jefferson County.

The anesthesiologists offered Mr. Oltz a job. However, he would have been supervised by anesthesiologists rather than attending physicians. Mr. Oltz refused, moved from Montana and became chief nurse anesthetist at a regional medical center associated with the University of Iowa.

Alleging Sherman Act §§ 1 and 2, civil rights and pendent state law claims, Mr. Oltz sued St. Peter's and the anesthesiologists. The anesthesiologists settled before trial. The civil rights, state law and Sherman Act § 2 claims against St. Peter's were dismissed on its motion for summary judgment before trial. After trial and a jury verdict for the plaintiff on the Sherman Act § 1 claim, the trial court denied St. Peter's motion for judgment n.o.v. or for a new trial, entering judgment of liability, but *sua sponte* granted a new trial with respect to damages. The case was certified for interlocutory appeal on questions of liability and for cross-appeal on the order for a new trial on damages. This Court (per Hug, J. with Wright and Wallace, JJ.) affirmed both the finding of liability and the order for a new trial on damages on November 28, 1988.

ARGUMENT

I

CONFLICTS WITHIN THE CIRCUIT REQUIRE REHEARING OF THIS CASE

A. St. Peter's Has Insufficient Relation to Interstate Commerce To Justify Sherman Act Jurisdiction.

1. The *Mitchell* Case requires a Finding of No Jurisdiction.

a. *The Mitchell Precedent.* On August 8, 1988, this Court (per Norris, J. with Goodwin, C. J. and Choy, J.)

held that a rural hospital's exclusive contract with a radiologist had insufficient impact on interstate commerce to trigger Sherman Act jurisdiction. *Mitchell v. Frank R. Howard Memorial Hosp., supra*, 853 F.2d 762 (9th Cir.), *cert. petition filed*, (1988) (App. 25.)

The trial court entered judgment for the hospital, rejecting Dr. Mitchell's contention that jursidiction arose because the hospital received substantial revenues from out-of-state public and private sources and purchased an unknown amount of medical supplies from out-of-state sources. *Id.* at 763. This Court affirmed, quoting the District Court's language that:

> determinations of [Sherman Act] jurisdiction in [hospital cases] are based not merely upon revenue figures, but on a broad aggregate of factors including proximity of the facility to regional centers of commerce or to other states, treatment of significant numbers of out-of-state patients, purchase of equipment and supplies from interstate sources and interstate transfer of payment for patient care. *Id.* at 764.

Jurisdiction is a "highly fact based question calling for common sense judgment." *Id.* The plaintiff has the burden to make a sufficient factual showing to invoke jurisdiction.

b. *The St. Peter's Facts.* The *St. Peter's* panel did not discuss jurisdiction, but assumed without deciding that the Sherman Act is applicable to a small-town hospital isolated from any major urban area. Like the hospital in *Mitchell*, St. Peter's obtains some payments from non-Montana private and public sources, but the record fails to show the amounts, if any, of supplies purchased outside the state or the numbers, if any, of non-Montanans who have ever been treated there. In practical economic terms, St. Peter's is a local community hospital that serves

Helena and its rural environs. There are insufficient factual underpinnings to uphold Sherman Act jurisdiction under *Mitchell* and the cases cited therein.

The panel's decision on liability must be reversed and brought into harmony with *Mitchell* because this Court lacks jurisdiction to apply the Sherman Act to St. Peter's.*

2. Even If There Were Jurisdiction, The Liability Decision Conflicts with a Circuit Rule That Activities Must Have a Substantial Impact on Interstate Commerce to Impose *Sherman Act Liability.*

The panel decision conflicts with prior decisions of this Circuit requiring proof of a "not insignificant adverse impact" on interstate commerce before Sherman Act liability is imposed.

a. *The Kaplan Precedent.* In *Kaplan v. Burroughs, supra,* 611 F.2d 286, 291 (9th Cir. 1979), this Circuit held:

> Proof that the defendant's activities had an impact upon competition in a relevant market is an *absolutely essential element* of the rule of reason case. It is the impact upon competitive conditions in a definable product market which distinguishes the antitrust violations from the ordinary business tort. (Emphasis added.)

St. Peter's submits that the panel's decision fails to show any actual injury to competition.

---

*St. Peter's contested jurisdiction before the trial court (Tr. Vol. I at 36-37), but its contention was denied. On appeal, it questioned jurisdiction because no evidence establishes a required nexus with interstate commerce. *See Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 743 (1976). (St. Peter's opening Brief on Appeal at 2)

b. *The St. Peter's Facts.* After rejecting the anesthesiologists' offer, Mr. Oltz advertised in a nationally distributed CRNA journal. He got responses from Washington, Oregon, Iowa and Ohio before accepting a job in the Virgin Islands. He later moved to Iowa where he obtained an academic and practitioner's position as chief nurse anesthetist with a regional medical center affiliated with a university. His wife, who is also a CRNA, found employment at the same medical center. His expert testified that once a CRNA is certified in one state, the certification is virtually universally honored throughout the United States and that the market is national in scope.

The question whether Mr. Oltz suffered any financial loss is open because, according to the panel, he had "juggled" his income and expenses, justifying a new trial with respect to damages. (St. Peter's submits that the evidence will show that Mr. Oltz and his wife earn more now than they could possibly have made by staying at St. Peter's and that they have suffered no losses.) St. Peter's received applications for its anesthesia staff from eight states.

The evidence shows a free flow of both anesthesiologists and anesthetists, but no adverse impact upon interstate commerce. Anesthesia services are available nationally, and those who are practitioners in anesthesia both compete and practice nationally. Terminating Mr. Oltz's billing contract had no impact on the market for providers of anesthesia. As Justice O'Connor has observed:

> Exclusive dealing is an unreasonable restraint on trade *only* when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal. When the sellers of services are numerous and mobile, and the number of buyers is large, exclusive-

> dealing arrangements of narrow scope pose no threat of adverse economic consequences.

Jefferson Parish, supra, 466 U.S. at 45, emphasis added (O'Connor, J., concurring).

The evidence in this case fails to meet the "not insignificant adverse impact" standard of *Kaplan*. This Circuit, by disregarding *Kaplan* in the *St. Peter's* decision, has apparently adopted a new standard of Sherman Act liability that fails Supreme Court standards. (*See infra,* pp. 9 *et seq.*)

3. The Panel's Treatment of Relevant Market and the Rule of Reason Analysis Results in a Per Se Rule for All Local, Small-Town Hospitals.

a. *The Per Se Effect of the Decision.* Although the Panel decision purports to reject a per se holding in favor of a rule of reason analysis (Sl. Op. at 14559 n.1), the decision in effect creates a per se violation for any isolated local or rural hospital which enters into an exclusive contract.

Although the *St. Peter's* panel cautions against enlarging the "boycott's pigeon hole" (*F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 477 (1986)), recognizes that it should hesitate to apply the boycott per se rule when the economic impact of an arrangement is not obvious, (*Harkins Amusement Enters., Inc. v. General Cinema Corp.*, 850 F.2d 477 (9th Cir. 1988)), and "decline[s] the invitation to invoke per se analysis in this case," (Sl. Op. at 14559 n.1), the decision finds the patient market in Helena, Montana, as the relevant market for assessing antitrust impact, thus making it virtually automatic or "per se" that sole hospitals in small cities or rural areas will face antitrust liability if they enter into an exclusive agreement with medical service providers. The panel's only response to its grave expansion of per se categories is to

label the problem as "overstated" and to encourage a case-by-case analysis. The *Mitchell* decision is totally to the contrary.

II

EN BANC CONSIDERATION OF THE CASE IS JUSTIFIED BY THE DIVISION AMONG CIRCUITS AND CONFLICT WITH THE SUPREME COURT CREATED BY THE ST. PETER'S DECISION

1. The "Relevant Market" Analysis in the Panel Decision Contradicts Supreme Court and Other Circuit Court Decisions.

The *St. Peter's* decision is the only reported decision research reveals in which a hospital's exclusive agreement with medical providers has yielded Sherman Act § 1 liability. Unlike a decision of the Supreme Court and reported decisions in other Circuits, the *St. Peter's* decision ignores the market for medical service providers and fails to recognize the significant justifications for exclusive hospital contracts.

a. The *Jefferson Parish* Decision Does Not Support the *St. Peter's* Decision. In *Jefferson Parish*, the United States Supreme Court upheld a hospital's exclusive contract with a group of anesthesiologists, even though the contract excluded an anesthesiologist from providing services at the hospital. In analyzing the relevant market, the majority opinion held:

> That burden necessarily involves an inquiry into the actual effect of the exclusive contract on competition among anesthesiologists .... The market is not necessarily the same as the market in which hospitals compete in offering services to patients. ...

Jefferson Parish, *supra*, 466 U.S. at 29.

Moreover, to establish a claim, the plaintiff must prove (as this Court had earlier held in *Kaplan*) an actual adverse effect on competition. The Supreme Court stated:

> Without a showing of *actual adverse effect on competition,* respondent cannot make out a case under the antitrust laws, and no such showing has been made.

Id. at 31, emphasis added.

The Jefferson Parish hospital's failure to grant privileges to a single anesthesiologist because of its exclusive anesthesiology contract with a particular group neither invalidated the exclusive agreement nor established antitrust injury. The majority stated:

> But there has been no showing that the market as a whole has been affected at all by the contract.... There is simply no showing here of the kind of restraint on competition that is prohibited by the Sherman Act.

Id. at 31, 32.

Concurring, Justice O'Connor indicated that the market scope is providers, not hospital services. She stated:

> Such an arrangement, which has little anti-competitive effect and achieves substantial benefits in the provision of care to patients, is hardly one that the antitrust law should condemn.

Id. at 44.

b. *The Panel Improperly Analyzed the Relevant Market.* Despite *Jefferson Parish* and this Circuit's settled precedent, the *St. Peter's* panel has made an incorrect relevant market analysis. In *Kaplan,* this Circuit stated that:

> Failure to produce substantial evidence proving a relevant market and an injury to competition within

> that market entitles a defendant in a rule of reason case to judgment n.o.v. . . . Familiar principles guide our search of the record below for evidence of proof of market definition and competitive impact. Even if sufficient proof of intent and causation are introduced, the *elimination of a single competitor, standing alone, does not prove anticompetitive effect.* . . . Impact upon the market must be proven by reference to definitions of both the relevant geographic market and the relevant product market.

Kaplan, supra, 611 F.2d at 291, emphasis added.

c. *The St. Peter's Decision.* In contrast to both *Jefferson Parish* and *Kaplan,* the *St. Peter's* decision relegates the relevant market concept to a "tool" of analysis only. The panel ignored the only evidence of market in the record: evidence which shows that the relevant market is the national market in which providers of anesthesia services compete, not a hospital or patient market. Mr. Oltz, a provider of anesthesia services, received responses to his advertisement from four states and a territory. Providers of anesthesia services from eight different states sought positions with St. Peter's. The impact of the termination of Mr. Oltz's exclusive billing arrangement created hardly a ripple, let alone a splash, in the national marketplace of anesthesia providers.

After determining that the relevant market is the patient market in Helena, not the market in which providers of anesthesia services compete, the *St. Peter's* decision states:

> Accordingly, we conclude that anesthesia services [not providers] and the Helena area framed the appropriate product market and geographic compo-

> nents of a relevant market in which the jury could assess injury to competition. (Sl. Op. at 14563)

In the guise of an assessment of the Helena patient market, the panel has ignored the fact that it was dealing with actions which might have had an adverse impact on one person only, the claimant (whose damages are uncertain), and has ignored the undisputed factual record showing the existence of a national market for providers of anesthesia services which was not adversely affected in any way whatsoever. *Jefferson Parish* and *Kaplan* do not support such a determination.

d. *Seventh Circuit Precedent.* In *Collins v. Associated Pathologists, Ltd., supra* 844 F.2d 473 (7th Cir. 1988), the Seventh Circuit held that *pathologists,* not their services, constitute the relevant market for analyzing the impact of an exclusive contract between a hospital and a group of pathologists. The hospital's exclusive agreement had no substantial anticompetitive effect upon the market in which pathologists compete for jobs.

The Seventh Circuit has also determined that an anesthesiologist cannot maintain an antitrust action against a hospital for denying him staff privileges on the basis of a reviewing board's medical judgment and the hospital's decision to grant an exclusive contract to another practitioner. *Ezpeleta v. Sisters of Mercy Health Corp.,* 800 F.2d 119 (7th Cir. 1984). *See also Dos Santos v. Columbus-Cuneo-Cabrini Medical Center,* 684 F.2d 1346 (7th Cir. 1982).

e. *Fourth Circuit Precedent.* In an unpublished decision dated May 10, 1988, the Fourth Circuit affirmed a district court decision that an exclusive contract between a hospital and a group of pathologists did not substan-

tially impair the market for the supply of pathology services and was not illegal under the Sherman Act. *Drs. Steuer and Latham, PA v. Nat. Med. Ent.,* (unpublished dec. 4th Cir. 1988), *aff'g,* 672 F.Supp. 1489 (D.S.C. 1987) (App. 88). The Circuit affirmed on the basis of the district court's reasoning.

The Fourth Circuit had earlier concluded that a defendant hospital's entry into an exclusive contract for anesthesiology services was reasonable and justified by community and hospital needs. *Capili v. Shott,* 620 F.2d 438 (4th Cir. 1980).

f. *Other Circuit and District Court Precedent.* In *Konik v. Champlain Valley Physicians Hospital Medical Center,* 733 F.2d 1007 (2d Cir.), *cert. denied,* 460 U.S. 884 (1984), the Second Circuit held that a hospital may legitimately control the number and identity of anesthesiologists who receive staff privileges. In *Wright v. Southern Mono Hospital District,* 631 F.Supp. 1294 (E.D. Cal. 1986), the Eastern District of California recognized that legitimate business reasons justified exclusive contracts to provide anesthesiology services at a hospital. The Southern District of New York reached a similar conclusion justifying exclusive contracts for anesthesiology services in *Rockland Physicians Association, P.C. v. Grodin,* 616 F.Supp. 945 (S.D.N.Y. 1986). *See also Gonzales v. Insignares,* 1985-2 Trade Cases, ¶65,701 (N.D. Ga. 1985). Commenting on the exclusive anesthesia contract in *Jefferson Parish,* Justic O'Connor wrote:

> Plainly, however, the arrangement forecloses only a small fraction of the markets in which anesthesiologists may sell their services, and a still smaller fraction of the market in which hospitals may secure

anesthesiological services. The contract therefore survives scrutiny under the rule of reason.

Jefferson Parish, supra, 466 U.S. at 46-47.

g. *The St. Peter's Decision.* Although the *St. Peter's* panel attempted to distinguish its decision from the *Collins* case upon the argument that there was no showing of patient preference for particular practitioners in *Collins*, the panel failed to resolve the actual conflict with *Collins* over the relevant market or the conflicts with other Circuits and other courts created by the panel's imposition of liability upon St. Peter's because of its exclusive contract with the anesthesiologists. The glaring division between the *St. Peter's* decision and cited decisions in other Circuits calls for rehearing en banc.

CONCLUSION

Because of conflicts with prior decisions within this Circuit, St. Peter's respectfully petitions the Court for rehearing. Because of the divisions among Circuits and the Supreme Court, St. Peter's suggests that a hearing en banc should be granted.

Dated: December 9, 1988

Respectfully submitted,

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MAILING CERTIFICATE

I, M. Karlynn Hinman, hereby certify that on this 9th day of December, 1988, I mailed true and correct copies of the foregoing Petition of St. Peter's Community Hospital for Renearing with Suggestion for Rehearing En Banc Under F.R.A.P. Rules 35(b), postage prepaid, to:

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M. Karlynn Hinman

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On February 10, 1989, I served the within Petitioner's Reply Brief in re: "Winston A. Mitchell, M.D. v. Frank R. Howard Memorial Hospital" in the United States Supreme Court, October Term 1988, No. 88-916;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

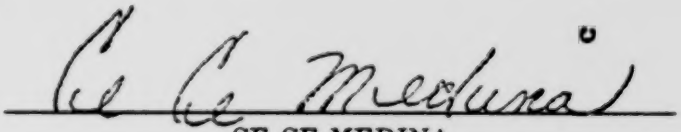
Theodore A. Kolb, Esq.
Sullivan, Roche & Johnson
220 Bush Street, 20th Floor
San Francisco, CA 94104

Robert L. Rusky, Esq.
Hanson Bridgett, Marcus,
Vlahos & Rudy
333 Market Street, Suite 2300
San Francisco, CA 94105

All Parties required to be served have been served.

I certify, under penalty of perjury, that the foregoing is true and correct.

Executed on February 10, 1989, at Los Angeles, California



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